



State of New Jersey

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State Comptroller

November 10, 2010

Mr. Gary Bonacci
Borough Administrator
Borough of Ridgefield
604 Broad Avenue
Ridgefield, New Jersey 07657

Re: Review of Borough of Ridgefield Procurements

Dear Mr. Bonacci:

Pursuant to N.J.S.A. 52:15C-1 et seq., the Office of the State Comptroller ("OSC") is charged with monitoring and reviewing the solicitation process and award of contracts by units of government to ensure that the process complies with applicable public contracting laws, rules, and regulations. In furtherance of this statutory authority, over the past year OSC requested and reviewed selected contract-related documents from the Borough of Ridgefield (the "Borough") and other municipalities.

As a result of that review, OSC has identified a number of issues in connection with the Borough's procurement and management of its professional services contracts. We write this letter to bring these issues to your attention and to ensure that they are addressed going forward.

- (1) The Borough informed OSC that all of its professional services procurements are conducted through a "fair and open" process. N.J.S.A. 19:44A-20.7. In accordance with N.J.S.A. 19:44A-20.5, "a municipality...shall not enter into a contract having an anticipated value in excess of \$17,500...with a business entity, except a contract that is awarded pursuant to a fair and open process, if, during the preceding one-year period, that business entity has made a contribution that is reportable by the recipient under P.L. 1973, c. 83 (C. 19:44A-1 et seq.), to any municipal committee of a political party in that municipality if a member of that political party is serving in an elective public office of that municipality when the contract is awarded or to any candidate committee of any person serving in an elective public office of that municipality when the contract is awarded." A "fair and open process" means at a minimum that the contract shall be: (1) "publicly advertised in newspapers or on the

Internet website maintained by the public entity in sufficient time to give notice in advance of the contract”; (2) “awarded under a process that provides for public solicitation of proposals or qualifications”; (3) “awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications”; and (4) “publicly opened and announced when awarded.” N.J.S.A. 19:44A-20.7. In addition, best practices provide for the formation of an evaluation committee to evaluate and score professional services proposals, and further call for such scoring to be documented.

We identified the following deficiencies and shortcomings in connection with the Borough’s professional services contract awards:

- (a) The Borough did not convene a formal evaluation committee to score the competing proposals;
- (b) The Borough did not use a formal evaluation process in determining which vendor would be awarded each contract;
- (c) Although the Borough’s Requests for Qualifications stated evaluative criteria, the Borough did not document any ensuing evaluations. Specifically, our review found that the Borough did not use any scoring sheets to document the scoring, if any, of the proposals. In response to our inquiries, the Borough stated that it “now understands that the ‘fair and open’ process requires the use of scoring sheets and will use them going forward;”
- (d) No steps were taken to screen Borough officials involved in the award process for potential conflicts of interest;
- (e) The Borough officials involved in the award process were not provided with any instructions or procedures to guide their award decision; and
- (f) No written recommendations concerning which vendors should receive the contracts were issued by Borough officials involved in the award process.

In subsequent correspondence with OSC, the Borough acknowledged all of the deficiencies cited above. As a result of these deficiencies, we are unable to confirm whether the Borough’s procurement of its professional services vendors was actually a “fair and open” process. Specifically, the lack of a formal evaluation process along with the Borough’s failure to document its evaluation of competing proposals raises questions as to whether these contracts were in fact “awarded under a process that provides for public solicitation of proposals or qualifications” and “awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications.” Moreover, the process used by the Borough lacked accountability and transparency.

- (2) Pursuant to N.J.S.A. 40A:11-5(1)(a)(i), all resolutions awarding professional services contracts must state reasons supporting the contract award. However, none of the

Borough's resolutions awarding professional services contracts in 2008 and 2009 state any supporting reasons for the awards.

- (3) The Borough informed OSC that it follows the guidance set forth in the Department of Community Affairs' Guide to the New Jersey Local Unit Pay-To-Play Law (the "DCA Guide") for its procurement of professional services. The DCA Guide states that all resolutions awarding contracts valued at more than \$17,500 should include wording indicating whether the contract has been awarded pursuant to a fair and open process or a non-fair and open process. None of the Borough's resolutions awarding professional services contracts in 2008 or 2009 included such language.
- (4) The DCA Guide also sets forth sample evaluation criteria that should be considered in the evaluation of fair and open contract awards. We noted that the Borough specifically excluded the use of price as an evaluative factor in all of its 2008 and 2009 professional services contracts, even though it is included as a suggested factor in the DCA Guide.
- (5) Our review also noted a number of specific deficiencies with the Borough's contracts with the Borough Attorney in 2008 and 2009 (collectively, the "Borough Attorney Contracts") as follows:
 - (a) In Loigman v. Township of Middletown, 409 N.J. Super 1, 11 (App. Div. 2009), the New Jersey Appellate Division held that fee arrangements for municipal attorneys must be "clearly defined and separated." Specifically, the Loigman court explained that any legal billing that is included as fixed compensation must be distinguished from legal services that are billed at an hourly rate and any overlap between the two is unlawful. Id. at 12. The two Borough Attorney Contracts provide for retainers in specified amounts of \$47,000 and \$49,500 and list the scope of services included in these retainers as "all matters which, in the reasonable opinion of the Mayor and Council, should be referred to the [Borough] Attorney and all matters which, by law, and/or tradition, should be referred to and handled by the [Borough] Attorney, including but not limited to all litigation and attendance at all regularly scheduled meetings of the Mayor and Council." (Emphasis added). The Borough Attorney Contracts also permit the Borough Attorney to bill at an additional hourly rate for certain "unique or special services." However, the services listed as "unique or special" in the Borough Attorney Contracts seemingly include every conceivable type of litigation, and our review of the Borough Attorney's billing invoices revealed that the Borough Attorney indeed billed at an hourly rate for the Borough's litigation services. Therefore, it appears that the Borough Attorney Contracts permit the Borough Attorney to receive a retainer for services that include all litigation and separately bill at an hourly rate for the same litigation services. In accordance with Loigman, these types of overlapping billing arrangements are not permitted.
 - (b) The 2008 Borough Attorney Contract specifically included within the retainer amount "the drafting of standard ordinances, resolutions, standard contracts and

for contract review, and the drafting and review of bid specifications and attendance at Borough Council Meetings.” Nevertheless, we found that the Borough Attorney routinely billed for these types of services at an additional hourly rate. Specific examples of the services that were billed at the hourly rate included preparing for and attending Borough Council meetings and drafting resolutions and ordinances. Similarly, we found that the Borough Attorney billed at an hourly rate in 2009 for preparing for and attending Borough Council meetings despite the fact that the 2009 Borough Attorney Contract included these services within the retainer amount.

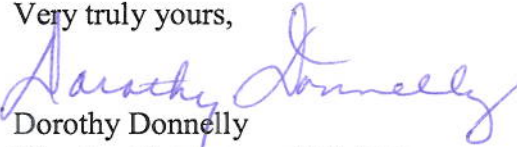
- (c) While the Borough contracted personally with the Borough Attorney to perform required legal services, other attorneys at his law firm regularly billed for the Borough Attorney services in 2008 and 2009. Although the 2008 Borough Attorney Contract included language permitting the Borough Attorney to delegate such work to other attorneys at his law firm, the 2009 Borough Attorney Contract did not include language authorizing such an arrangement.
- (d) Pursuant to N.J.S.A. 43:15A-7.2, effective January 1, 2008, individuals performing services for units of government under a professional services contract are not eligible to receive pension credits for their services. However, the Borough made a pension contribution in the amount of \$12,375 on behalf of the Borough Attorney for the first quarter of 2008. Although it appears that the Borough appropriately removed the Borough Attorney from the pension system after this initial contribution, we are referring this matter to the New Jersey Division of Pensions and Benefits to determine whether the ineligible contribution and accompanying pension credit should be returned.
- (6) The Borough’s contract with the Borough Engineer provided for the payment of a monthly retainer in the amount of \$1,900 and also permitted the engineer to bill at an hourly rate. However, the Borough Engineer contract does not distinguish between the services that are included under the retainer payment and those that are to be billed at an hourly rate. Although the Loigman decision addressed this type of overlapping fee arrangement in the context of the engagement of a municipal attorney, it can be reasonably inferred that the court’s restriction would also apply to other professional services contracts such as a municipal engineer.

As a result of the issues identified in this letter and in order to ensure compliance with applicable laws, regulations and rules, pursuant to N.J.S.A. 52:15C-11(a) OSC hereby requires that the Borough:

- (1) Prepare a detailed Action Plan that addresses the steps that the Borough intends to take to address the issues identified in this letter and provide the Action Plan to OSC no later than 30 days after receipt of this letter; and
- (2) Provide notice to OSC at least 30 days prior to the advertisement of any of the Borough’s professional services contracts.

If you have any questions, please call me at (609) 984-2888. Thank you for your continued cooperation in this matter.

Very truly yours,



Dorothy Donnelly
Director, Procurement Division

cc: Mayor Anthony Suarez
Ms. Linda Prina, Borough Clerk